At Issue:

Is mandatory arbitration harmful to harassment victims?

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For a number of years, the U.S. Supreme Court has grown increasingly supportive of arbitration agreements entered into by employer and employee. Both sides agree to submit to confidential binding arbitration on any employment-related dispute, including sexual harassment complaints. So you forgo your right to go to court and have a trial by jury. That means you also have given up the opportunity to have a public proceeding.

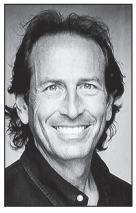
One of the consequences is that somebody could have just gone through arbitration against Supervisor A, and you could be working under the same supervisor and being harassed, but you would not know that others have made the same claim. You are stuck having to prove your claim from scratch, when having knowledge of a similar claim by a co-worker could help you build your case.

When arbitration is used to resolve a private dispute, nobody knows about it except the employer. You lose the benefit of having rulings that are public and could guide people's conduct in the future.

The more we have decisions entered by arbitrators, the more we are having adjudication that may not reflect the modern workplace. For example, if sexual harassment claims involve gender fluidity, we may never know about them. Arbitrators may be making thoughtful rulings on law in those cases — but they are doing it in private. So we are losing the ability to be guided by the courts in these cases because increasingly, employers are using arbitration as a way to settle workplace disputes.

Another set of issues arises when the arbitration agreements have provisions that prohibit class-action lawsuits. If I and a co-worker both feel we have been harassed and want to adjudicate our claims together, the arbitration agreement says we cannot do that. We have to use separate arbitrators, even though our claims are about the same thing.

Finally, arbitration companies typically are hired by the employers against whom the claims are being made. Judges tend to be a lot more independent. Arbitrators don't have that same liberty. They have less independence than judges, in part, because they might not be selected again if they rule against the employer. This creates at least the perception that some arbitrators have an economic incentive to be beholden to employers.



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Along with the spate of sexual harassment cases that have made headlines recently — from Uber, Fox News, the University of California, Berkeley, and others — has come a round of criticism against organizations that require their employees to take their complaints to an arbitrator rather than to a judge.

Personally, I would rather work for a company that has an arbitration policy. Here is why:

• Companies that have pre-dispute mandatory arbitration policies are well versed in the law. They settle cases they cannot win. They cannot use the delays inherent in litigation to draw the process out.

• Arbitration is much quicker than a court case. A victim who can prove sexual harassment to an arbitrator will walk away with an award within the year. That same victim, if she takes her case to court, will wait two or more years for a trial and then has to fear numerous motions, appeals and other delays.

• The level of discovery in arbitration is minimal when compared with that of federal court. That means the process is usually less invasive for the sexual harassment victim. Employers, when they become defendants in a lawsuit, tend to tear at an accuser's character and integrity. Unlike private arbitration, litigation leaves a public record that contains those personal details, which colleagues may read if they choose.

• Lawyers are expensive, and pursuing a court case is a huge investment. In fact, the cost of hiring counsel stops many sexual harassment victims from going to court. While most lawyers will take harassment cases on a contingency basis — that is, they will take a part of the settlement rather than charge an hourly fee — they still want substantial "upfront" money. Arbitration is an easier system to be *pro se* (on one's own behalf) and is less of an investment for lawyers.

• The facts do not support the argument that the public "needs to know" about the employer's conduct. Fewer than 1 percent of all discrimination charges are resolved at trial, and even fewer court cases involving harassment claims find their way into the headlines. The cases of high-profile harassers like Fox News' Bill O'Reilly and Uber's Travis Kalanick became notorious only because the players were already famous.

Arbitration is not perfect, but don't reject it until you compare it to the alternatives.